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JAMES R. BR

# Supreme Court of the United States

OCTOBER TERM 1958

No. 871

AMERICAN EXPORT LINES, INC.,
*Petitioner,*

—*against*—

GULF ITALIA COMPANY,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## INDEX


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statute Involved | 3 |
| Statement | 3 |
| Reasons for Granting the Writ | 5 |
| Conclusion | 17 |
| SUPPLEMENT A—Opinion of the District Court | 1a |
| SUPPLEMENT B—Opinion of the Court of Appeals | 9a |
| SUPPLEMENT C—Agreed Statement of Facts | 16a |


## TABLE OF CASES CITED


| | |
|---|---|
| *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913) | 15 |
| *Bill, The*, 55 F. Supp. 780 (D. Md. 1944), aff'd. per curiam, 145 F. 2d 470 (4th Cir. 1944) | 10, 11, 12, 13, 14, 15 |
| *Caminetti* v. *United States*, 242 U. S. 470 (1917) | 9 |

PAGE

*Hart* v. *Penn. R. R. Co.*, 112 U. S. 331 (1884) ..... 15, 16

*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639 (1913) ..... 10, 16

*Kensington, The*, 183 U. S. 263 (1902) ..... 16

*Margaret Lykes, The*, 57 F. Supp. 466 (E. D. La. 1944) ..... 11, 14

*Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 487 (S. D. N. Y. 1949) ..... 9

*Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F. 2d 603 (2d Cir. 1946); *cert. den.* 329 U. S. 774 (1946) ..... 7

*Peter Pannell* v. *The United States Lines*, 263 F. 2d 497 (2d Cir. 1959) ..... 10

*Petition of Isbrandtsen Company, Inc.*, 201 F. 2d 281 (2d Cir. 1953) ..... 14

*Stirnimann* v. *The San Diego*, 148 F. 2d 141 (2d Cir. 1945) ..... 13, 14

*Studebaker Distributors Ltd.* v. *Charlton S. S. Co. Ltd.*, 1 K. B. 459 (1938) ..... 14

*Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317 (1921) ..... 16

*U. S. Willow Furniture Co.* v. *La Compagnie Générale Transatlantique*, 271 Fed. 184 (2d Cir. 1921) ..... 16

*Waterman S. S. Corp.* v. *U. S. Smelting, Refining & Mining Co.*, 155 F. 2d 687 (5th Cir. 1946) *cert. den.* 329 U. S. 761 (1946) ..... 13, 14

*Whaite* v. *The Lancashire & Yorkshire Ry. Co.*, L. R. 9 Ex. 67 (1875) ..... 9

## STATUTES CITED


PAGE

The Carriage of Goods By Sea Act:
49 Stat. 1210 (1936), 46 U. S. C. § 1304 (5) .... 2, 3
49 Stat. 1212 (1936), 46 U. S. C. § 1312 ..... 5


## MISCELLANEOUS


BLACK's Law Dictionary ..... 8
BOUVIER's Law Dictionary ..... 8
H. R. Rept. 2218, 74 Cong. 2d Sess. (1936) ..... 12
Hearings, Committee on Foreign Relations, December 22, 1927 ..... 12
Temperley & Vaughn, Carriage of Goods By Sea Act, 1924 (4th ed. 1932) ..... 11
Webster's New International Dictionary ..... 8

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| AMERICAN EXPORT LINES, INC., *Petitioner,* —*against*— GULF ITALIA COMPANY, *Respondent:* | No..... |

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, American Export Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 28, 1959.

### CITATIONS TO OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of New York (John M. Cashin, U. S. D. J.), printed in Supplement A appended hereto, pages 1a to 8a, is reported at 160 F. Supp. 956. The Opinion of the United States Court of Appeals, printed in Supplement B, pages 9a to 15a, is reported at 263 F. 2d 135.

## JURISDICTIONS

The judgment of the Court of Appeals for the Second Circuit was entered on January 28, 1959. The Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

## QUESTIONS PRESENTED

1. What is the meaning of the phrase *"$500 per package lawful money of the United States, or in the case of goods not shipped in packages, per customary freight unit"* contained in Section 4(5) of the United States Carriage of Goods By Sea Act, 49 Stat. 1210 (1936), 46 U. S. C. § 1304 (5)?

2. Whether the Court below violated the "plain meaning" rule of statutory construction.

3. Is the word "package" as used in the Carriage of Goods By Sea Act limited to only fully enclosed containers?

4. Whether the words "per customary freight unit" refer to the shipping unit as listed in the bill of lading or whether they refer to "the unit upon which the charge for the freight is computed," as the Court below held.

5. Was it the intent of Congress that shippers who fail to box their goods completely may recover unlimited amounts on a $500-per-ton basis, but that shippers who completely box their goods may recover no more than $500?

6. Should shippers be estopped from asserting higher valuations for the goods after they choose to accept the benefit of lower freight rates which are dependent upon the $500 limitation specified in the Carriage of Goods By Sea Act?

## STATUTE INVOLVED

The statutory provision involved is Section 4 (5) of the United States Carriage of Goods by Sea Act, 49 Stat. 1210 (1936), 46 U. S. C. § 1304 (5), which provides:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in the case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

## STATEMENT

The Petitioner was discharging one of its vessels, the s/s Ixiria, in the port of Palermo, Italy, on September 6, 1954, when a "D-8" tractor owned by the Respondent was damaged. It was stipulated in the District Court proceedings that the Petitioner was responsible for the loss. (Supplement C, page 17a). It was also stipulated that Respondent had not declared a valuation before shipment and had not paid additional *ad valorem* rates. (Supplement C, page 18a).

The only issue tried by the Lower Court was as to the limit of the amount which Respondent could recover under the limitation provisions of the United States Carriage of Goods by Sea Act, 49 Stat. 1210 (1936), 46 U. S. C. § 1304 (5). Your Petitioner maintained that the limit of its liability was $500, while Respondent contended it was $17,300.

The tractor was shipped under Petitioner's bill of lading which described the unit as "1 semi-boxed" Caterpillar

tractor and listed it as one of "6 packages." Respondent paid $1,332.10 freight on the basis of the lower "packed rate" specified for "tractors, boxed with the exception of traction threads" in the Tariff provisions of the North Atlantic Mediterranean Freight Conference, of which Conference both Respondent and Petitioner were members. The Tariff provided a choice of rates for shippers electing to ship at a value in excess of the $500 bill of lading limit of value.

It was stipulated (Supplement C, page 19a) that "if the shipper had declared the value before shipment, he would in addition [to the "packed" rate] have had to pay an *ad valorem* rate of 6% on the value declared in excess of the bill of lading limit of value." The value now claimed for the tractor is $18,074 (Appendix Record, page 34a), so the *ad valorem* freight would have been computed as follows: $1,332.10 "packed" rate, plus 6% of ($18,074—$500) equals $2,386.54, *ad valorem* rate.

It was also stipulated that Respondent had requested that the tractor be "packed securely for export" in the manner shown in the photographs (Appendix Record, pages 17a-23a). The tractor had most of its superstructure boxed, and in addition waterproof paper was wrapped and strapped around some other parts. Respondent's Claim Statement includes an item of $240 for the "cost of semi-boxing" (Appendix Record, page 34a).

The suit was tried upon stipulated facts in the United States District Court, Southern District of New York before Judge John W. Cashin. On January 13, 1958, Judge Cashin handed down an opinion in favor of Gulf-Italia, holding that the semi-boxed tractor was not a "package" within the meaning of the Act, because 1) it was not fully enclosed, 2) it was too valuable, and 3) it was too large or heavy to be considered a package "in the ordinary layman's sense of the term."

The case was appealed to the United States Court of Appeals for the Second Circuit and was argued before Circuit Judges Swan and Moore and Visiting District Judge Kaufman. The two Circuit Judges disagreed. District Judge Kaufman concurred with Judge Swan who wrote the majority opinion holding that the tractor was not "in a package" because it was not completely covered.

Circuit Judge Moore wrote the dissenting opinion, holding that the semi-boxed tractor was either a "package" or a "customary freight unit" to which the $500 limitation should be applied.

The District Court had jurisdiction in this matter pursuant to 62 Stat. 931 (1948), 28 U. S. C. § 1333, as amended.

## REASONS FOR GRANTING THE WRIT

### POINT I

**THIS CASE INVOLVES AN IMPORTANT QUESTION OF CONSTRUCTION AND APPLICATION OF SECTION 4(5) OF THE UNITED STATES CARRIAGE OF GOODS BY SEA ACT WHICH AFFECTS THE ENTIRE MARITIME INDUSTRY. IT TOUCHES UPON ALL GOODS CARRIED BY SEA UNDER BILLS OF LADING TO AND FROM THE UNITED STATES. THIS QUESTION HAS NEVER BEEN CONSIDERED BY THE SUPREME COURT.**

The $500 limitation "per package" or "per customary freight unit" contained in the United States Carriage of Goods By Sea Act applies "to or from ports of the United States in foreign trade." 49 Stat. 1212 (1936), 46 U. S. C. § 1312. It is of vital interest to shippers, carriers and marine risk underwriters.

The clause provides that the carrier shall not in any event become liable for loss or damage to goods in an amount

exceeding $500 "per package", or in the case of goods not shipped in packages, "per customary freight unit . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

The $500 limitation clause was designed to enable both the shipper and the ocean carrier to know beforehand the risks they assume. The carrier, knowing the limits of liability, can set up freight charges accordingly. The shipper, knowing the limit of what he can recover from the carrier in case of loss, can insure his goods accordingly. The risks which are assumed by the carrier and the shipper being more definitely determined, the marine underwriters for the ship as well as those for the shipper can fix their premiums accordingly.

In other words, it is simply a question of who is going to buy the insurance above the $500 limitation—the shipper or the carrier? The shipper is the one who knows the value of his cargo and he knows how much insurance should be purchased to cover the risk. The carrier, on the other hand does not know and has no way of knowing the value of the cargo unless the shipper declares the valuation on the bill of lading. In such cases, the shipper requests *ad valorem* valuation and pays additional freight charges as a *quid pro quo* for complete protection. In effect, the shipper asks the carrier to buy insurance coverage for him in excess of $500, and the extra insurance charge is included in the carrier's *ad valorem* freight rate.

Of course, the ultimate responsibility for the payment of the insurance, whether it is purchased directly by the shipper or indirectly through the carrier by paying *ad valorem* freight charges, must necessarily fall upon the shipper who is the owner of the goods.

The Carriage of Goods By Sea Act leaves to the shipper the choice of limiting the value of his goods to $500 per

package or unit or declaring a higher valuation for any amount up to the actual value of the goods and paying additional freight for the added risk. In *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F. 2d 603, 605 (2d Cir. 1946), *cert. den.* 329 U. S. 774 (1946), the Court said:

> "The appellants' argument that the shipper cheats the carrier out of an increased freight rate when he fails to declare the value of a package worth more than $500 is without merit. If the shipper is willing to bear the risk of loss above that sum, he is privileged to ship at the normal rate; he owed the carrier no duty to declare the value and pay a higher rate."

By the same token, the carrier should owe no duty to a shipper to indemnify him in full for loss of valuable cargo when the shipper has chosen not to declare its value and to ship it at the ordinary rate.

Although the Respondent in this case stipulated that it did not declare valuation on the tractor in excess of the $500 limitation and did not pay any additional *ad valorem* rates, and also stipulated that the tractor was shipped at the "packed" rate; the Court of Appeals' interpretation of the word "package" and "customary freight unit" resulted in a limitation of $17,300 instead of the $500 limitation provided in the Act!

The decision below has caused a great deal of confusion and uncertainty in the shipping industry among both shippers and carriers, and insurance risks have truly been "cast upon a sea of doubt". There is urgent need for clarification of the $500 limitation clause so that the industry's sensitive rate structures may once again be placed on a sound foundation.

## POINT II

**THE WORDS "PACKAGE" AND "CUSTOMARY FREIGHT UNIT" WERE GIVEN MEANINGS SO INCONSISTENT IN THEORY BY THE MAJORITY OPINION THAT THE INTENT AND MEANING OF THE $500 LIMITATION CLAUSE IN THE STATUTE HAVE BEEN LEFT IN A STATE OF UNCERTAINTY AND CONFUSION.**

The decision of the United States Court of Appeals for the Second Circuit fails to follow the rules laid down by the Supreme Court of the United States for the construction of statutes containing words of plain meaning. The word "package" is simple and ordinary. The legislators did not deem it necessary to define it in the Act. The dictionaries all agree that the word "package" means anything bundled, wrapped or put up for transportation.

WEBSTER'S New International Dictionary defines the word "package" as "the manner of packing" and "bundles made up for transportation." BOUVIER'S Law Dictionary defines it as "a bundle put up for transportation or commercial handling." The Trial Court quoted the definition as given in BLACK'S Law Dictionary:

> "PACKAGE. A bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand. A parcel is a small package; 'parcel' being the diminutive of 'package'. Each of the words denotes a thing in form suitable for transportation or handling or sale from hand to hand. As ordinarily understood in the commercial world, it means a shipping package."

It is the duty of the Courts to take simple words which the legislature has seen fit to employ and to give them their usual ordinary meaning. As the Supreme Court has said:

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917).

The few reported cases interpreting the word "package" have given it the broadest possible meaning when used in commerce. In England, an open wagon containing oil paintings was held to be a "package" subject to a carrier's limitation. *Whaite* v. *The Lancashire and Yorkshire Ry. Co.*, L. R. 9 Ex. 67 (1875). In this country pieces of machinery merely mounted on skids were held to be a package. *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 487 (S. D. N. Y. 1949).

The Court of Appeals adopted the unique construction asserted by Respondent that nothing is a "package" as used in the Act, unless it is "fully enclosed". The word "package" was stripped of its ordinary broad meaning as defined in the dictionaries and as used in commerce and was limited to just one type of package: a box or other complete container. "Any test dependent upon the extent of external covering would lead to uncertainty and increase litigation", Judge Swan commented. Yet, since the passage of the Act in 1936, there has been only one previous case dealing directly with the meaning of the word "package". *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 487 (S. D. N. Y. 1949). Until Respondent raised the question of limitation in this case, there was apparently little doubt in the industry about the meaning of the word "package". As Judge Moore observed in his dissenting opinion "there is a surprising dearth of decided cases on the subject."

Adding to the confusion caused by the decision below in holding that only a complete box is a "package", is the fact that on the same day that this case was decided, the

Court of Appeals for the Second Circuit handed down another opinion holding that a yacht, shipped completely uncovered and carried on deck was a "package" under a bill of lading which incorporated the United States Carriage of Goods By Sea Act. *Peter Pannell* v. *United States Lines Company*, 263 F. 2d 497 (2d Cir. 1959).

To permit an established statutory limitation to be overthrown by disregarding the plain meaning of a statute for the purpose of enabling a shipper to obtain a recovery in excess of the maximum valuation fixed by statute, would reward undervaluations by shippers and encourage practices not conducive to sound morals or wise policies. See *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639 (1913).

## POINT III

**THE ANOMALOUS DECISION REACHED BY THE MAJORITY RESULTED FROM ERRONEOUSLY APPLYING THE BULK CARGO RULE OF *THE BILL*, 55 F. Supp. 780, TO A TRACTOR. THE APPLICATION OF THE $500 LIMITATION DEPENDS ON WHETHER OR NOT "THE NATURE AND VALUE OF SUCH GOODS HAVE BEEN DECLARED BY THE SHIPPER" AND NOT ON THE MANNER IN WHICH THE GOODS HAPPEN TO BE PREPARED FOR SHIPMENT. THE DECISION BELOW IS IN CONFLICT WITH OTHER DECISIONS IN THE SECOND CIRCUIT AND IN OTHER JURISDICTIONS.**

Judge Swan, in writing the majority opinion, agreed with the trial judge that to apply the limitation to partially covered packages "would cause 'a shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive parts' to be placed in a worse position than a shipper who makes no effort to reduce the possibility of loss from inclement weather or pilferage."

The Court's ruling, however, ironically places in the "worse position" the most diligent shipper—the one who completely boxes his merchandise—only he would be subject to the "package" limitation under the ruling of the majority opinion. As Judge Moore pointed out in his dissenting opinion (Supplement B, p. 13a):

> "Had a few additional pieces of lumber been placed around the tractor treads a package would concededly have resulted, but this would have been a needless act because the treads themselves did not require protection. It would indeed be an anomalous situation if a shipper who had completely enclosed a tractor were limited to damages of $500 whereas another shipper could recover on a weight or size basis merely because he had allowed some indestructible part to protrude from the package."

Certainly Congress could not have intended such an incongruous result! The interpretation only acts to discourage sound packaging of ocean freight.

It should make no difference, insofar as the application of the $500 limitation is concerned, that a given item of cargo happens to be shipped boxed, semi-boxed, on skids, or unboxed. The words "freight unit" denote all items not shipped in a "package." *The Margaret Lykes*, 57 F. Supp. 466, 470 (E. D. La., 1944). But see *The Bill*, 55 F. Supp. 780 (D. Md. 1944).

Temperley & Vaughan, CARRIAGE OF GOODS BY SEA ACT, 1924, 4th Ed. 1932, in discussing the term "package or unit" as used in the 1921 Hague Rules, which were subsequently adopted here, with minor changes, as the United States Carriage of Goods By Sea Act, say at page 81:

> "Further, the natural interpretation of the word 'unit' in the phrase 'package or unit' appears to be that it has been added in order to cover parts of a cargo similar in a general way to a package, but

> not strictly included in that term, which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word 'unit' has, it is suggested, been added in order to embrace such things and not to extend the scope of the Rule to bulk cargoes or parts thereof."

When the United States Carriage of Goods By Sea Act was drafted, the words "per package or unit" were amplified by the Committee on Merchant Marine and Fisheries, H. R. Rep. No. 2218, 74 Cong. 2d Sess. (1936), to read:

> "Per package . . . or in case of goods not shipped in packages, per customary freight unit."

There is nothing in the legislative history indicating that the change of language was intended to alter in any way the meaning of the Act so as to make our $500 limitation different from those of all the other maritime countries which have adopted the Hague Rules.

Judge Charles M. Hough, United States Circuit Court, Second Circuit, who was a delegate at the 1922 Brussels Conference which revised the Hague Rules, advised the State Department that "the words used in the Bill reported out of the Committee mean exactly the same thing as 'per package or unit.'" Report of Hearing, Committee on Foreign Relations, December 22, 1927, pp. 29 and 32.

The origin of the view that the phrase "freight unit" means the unit upon which freight is computed and not the shipping unit can be traced to *The Bill*, 55 F. Supp. 780 (D. Md. 1944). *The Bill, supra*, involved a shipment of oil in bulk and the Court held, on the evidence submitted, that the "customary freight unit" in that case was 1,000 kilos. The Court did not pass on whether the Carriage of Goods By Sea Act applied to bulk cargo since the parties had already agreed by stipulation that the Act should be

applied. The opinion in *The Bill, supra* is, therefore, mostly dicta.

The bulk rule of *The Bill, supra*, was applied to a shipment of 1,052 tons of unpackaged steel in *Waterman S. S. Corp.* v. *U. S. Smelting, Refining & Mining Co.*, 155 F. 2d 687, (5th Cir. 1946). Certiorari was denied by the United States Supreme Court, 329 U. S. 761 (1946). The limitation of liability question was not included in the question on which the petitioner (the carrier) sought a review.

At any rate, the rule of *The Bill*, 55 F. Supp. 780 (D. Md. 1944), may provide a practical solution to the problem of applying the $500 limitation to goods shipped in bulk, of which no mention is made in the Act, for bulk cargoes are in fact customarily described by weight or measurement tons, but general cargo is customarily shipped by piece count, each of which is a separate "freight unit."

It is certainly not customary to describe a tractor on a bill of lading as "34.6 tons of tractor" and, in fact, the bill of lading in this case describes it as "1 semi-boxed caterpillar tractor."

The Court of Appeals for the Second Circuit correctly applied the $500 "freight unit" limitation to pieces of machinery shipped uncrated in *Stirnimann* v. *The San Diego*, 148 F. 2d 141 (2d Cir. 1945). In that case a giant amusement crane was shipped in 126 parts. The trial judge found that:

> "The damage claim by libelant was in all respect to those parts which were not crated and whose external condition could readily be observed." 55 F. Supp. 798, 799 (S. D. N. Y. 1944).

The Court of Appeals affirmed the lower Court's holding that each of the uncrated pieces of machinery was a "freight unit" subject separately to the $500 limitation.

Surprisingly, the majority opinion below cited the *Stirnimann* case without overruling or distinguishing it. It then cited *Waterman S. S. Co. v. U. S. Smelting, Refining & Mining Co.*, 155 F. 2d 687 (5th Cir. 1946) *cert. den.* 329 U. S. 761 (1946) and *The Bill*, 55 F. Supp. 780 (D. Md. 1944), which were both bulk cargo cases. It made reference to *Studebaker Distributors, Ltd. v. Charlton S. S. Co., Ltd.*, 1 K. B. 459 (1938), in which case the English Court, passing on a limitation of $250 for "each package", pointed out that an unpacked automobile was not a "package" but commented, at p. 467:

> "If the shipowners' desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, 'package or unit', to use the language of the Hague Rules."

In *Petition of Isbrandtsen Co., Inc.*, 201 F. 2d 281 (2d Cir. 1953), the Second Circuit applied the $500 limitation to an unboxed locomotive and tender.

The decision below is also in conflict with a District Court decision in the Fifth Circuit which held that an unboxed motor truck was either a "package" because it had been so regarded by the parties or was certainly a "freight unit" such as Congress had in mind in Section 4 (5) of the Carriage of Goods by Sea Act. In the *Margaret Lykes* 57 F. Supp. 466 (E. D. La. 1944) the Court said at page 471:

> "It is immaterial whether or not the uncrated truck was such an article as came within the commonplace definition of 'package', inasmuch as the parties contractant elected to so denominate it. . . .
>
> But whether this be so or not, the truck was certainly a 'freight unit' such as Congress had in mind when it legislated as to transportation of package freight, bulk freight and 'freight not concealed by packages', and provided that, unless a greater value were declared by the shipper before

shipment and inserted in the bill of lading, neither carrier nor ship may be held liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package or in case of goods not shipped in packages, per customary freight unit."

It is therefore, difficult to understand how the Court below could have reached a conclusion that the semi-boxed tractor was neither a "package" nor a "unit". The legislative history shows clearly that both the word "package" and the word "freight unit" refer to the goods themselves, not to the method of computing freight. The dicta in *The Bill*, 55 F. Supp. 780 (D. Md. 1944), aff'd per curiam 145 F. 2d 470 (4th Cir. 1944) started a senseless chain reaction which had led to the incongruous result reached in this case. Petitioner prays that this Court put a stop to it now before the very purpose of the limitation is destroyed.

## POINT IV

**THE COURT OF APPEALS SHOULD HAVE ESTOPPED RESPONDENT FROM ASSERTING A HIGHER VALUE AFTER IT HAD ACCEPTED THE BENEFIT OF THE LOWER RATE WHICH WAS DEPENDENT UPON THE SPECIFIED $500 LIMITATION, IN ACCORDANCE WITH THE DECISIONS OF THE SUPREME COURT.**

Petitioner also contended below that there was a conclusive presumption that if the carrier's liability for damage to the tractor had been assumed on a valuation thereof as great as that now alleged by the shipper, a higher rate of freight would have been charged, as shown in the Tariff provisions. *Hart* v. *Penn. Ry. Co.*, 112 U. S. 331, 337 (1884); *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913).

The Supreme Court has upheld contractual valuation clauses on the basis of estoppel where the shipper was afforded the opportunity of declaring a higher value and paying a higher freight rate. *Hart* v. *Penn R. R. Co.*, 112 U. S. 331 (1884); *The Kensington*, 183 U. S. 263 (1902); *U. S. Willow Furniture Co.* v. *La Compagnie Generale Transatlantique*, 271 Fed. 184 (2d Cir. 1921). In *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317 (1921), the Court used the following language in defining the circumstances where a shipper would be bound by a limitation clause in a bill of lading:

> "As a matter of legal distinction, estoppel is made the basis of this ruling—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained—but the rule and the effect of it are clearly established."

In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639 (1913), the Supreme Court said at page 652:

> "To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage, in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The doctrine of estoppel should apply all the more to the $500 valuation clause in the Act because the amount was stipulated by Congress itself and its reasonableness cannot be questioned.

## CONCLUSION

**A WRIT OF CERTIORARI SHOULD BE GRANTED IN ACCORDANCE WITH THE PRAYER OF THIS PETITION.**

Dated, New York, N. Y., April , 1959

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# SUPPLEMENT A

## Opinion of the District Court

(Record, pages 105-115)

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

---

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CASHIN, JOHN M., *U. S. D. J.*

In this action for cargo damage, the parties have stipulated the following facts essential to a decision, which are therefore found as facts:

Libellant was the owner of a tractor which was shipped under a clean bill of lading upon the S.S. Exiria owned by respondent, American Export Lines, Inc., from the Port of New York to Palermo, Italy, on or about August 18, 1954. The tractor was re-delivered in a damaged condition. Respondent is responsible for the damage to the tractor. The tractor was prepared for shipment by putting waterproof papering about some of the more vital parts of the

superstructure and by partially encasing the superstructure with wooden planking. The tread portion of the tractor was not prepared for shipment in any way, nor was the tractor attached to a skid. Exhibits 4, 5, 6 and 7, attached to the stipulated facts, demonstrate photographically the precise manner in which the tractor was prepared for shipment. Freight was charged on the basis of measurement tons, the tractor being 34.6 measurement tons.

Under the facts, as stipulated and found by the Court, only one basic issue is presented, namely, is the tractor which is the subject matter of this lawsuit, as prepared for shipment, to be deemed a "package" under the Carriage of Goods by Sea Act:[1]

The respondent admits liability but claims that its liability is limited to $500.00 under Section 4(5) of the Carriage of Goods by Sea Act (Title 46 U. S. C. A. § 1304(5)), the relevant terms of which are set down in the margin.[2] Libellant contends, on the other hand, that although the liability of the respondent is to be limited under Section 4(5) of the Carriage of Goods by Sea Act, the measure of the limitation of liability is $500.00 per customary freight unit.

Respondent places great stress upon the fact that both parties, or those with power to bind them, are members of the "North Atlantic Mediterranean Freight Conference" and bound by its terms. Libellant does not dispute the fact

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[1]Title 46 U. S. C. A. § 1300 et seq.

[2]"(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. * * *"

that the parties are members of the Conference but argues that the terms of the Conference do not act to limit the liability of the respondent herein.

Section 8 of North Atlantic Mediterranean Freight Tariff No. 3 is relied upon by respondent. The terms thereof are set out in the margin.[3] I do not deem it necessary to interpret the meaning of Section 8 of the North Atlantic Mediterranean Freight Tariff No. 3. Nor do I deem it necessary to attempt to draw inferences from other

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[3] "8. CHOICE OF RATES:

This tariff offers Shipper a choice of freight rates dependent upon whether the shipment is made subject to Bill of Lading limit of value, or at a higher limit of value and in some cases at a specified lower limit of value.

(a) The rates shown in this tariff or in contracts herein provided, except there predicated on specifically lower values, or on an Ad Valorem basis, are subject to Bill of Lading limit of value.

(b) If the Shipper elects to ship at a value in excess of Bill of Lading limit of value he shall, in writing, declare the value before shipment and the rate applicable, unless already shown as Ad Valorem, is the tariff rate plus following Ad Valorems, on the value declared in excess of said Bill of Lading limit of value.

| | |
|---|---|
| Base Ports | 6% |
| Arbitrary Ports | 8½% |

Minimum charge on shipments so rated shall be $12.00 per package.

(c) Where rates are based on specific limitation of value (lower than Bill of Lading limit of value) the following clause must be placed on contracts and Bills of Lading:

'The value of the property is hereby specifically stated by the Shipper to be not in excess of ..... per ..... and the freight rate is predicated on this basis.'

(d) If the valuation in excess of Bill of Lading limit of value is not declared by the Shipper, in writing, before shipment as a basis for freight, such non-declaration shall constitute an election by the Shipper to ship on the basis of said Bill of Lading limit of value and any liability of the Ship Owner shall be computed on the basis of said limit of value in the manner provided in the Bill of Lading."

evidence submitted concerning the characterization by the parties of the tractor, as shipped, as a package. Suffice it to say that Section 3(8) of the Carriage of Goods by Sea Act (Title 46 U. S. C. A. §1303(8)), printed in the margin[4] has the legal effect of outlawing any limitation of liability for negligence except as set forth in Section 4(3) of the Act.[5] While the *Pan-Am Trade & Credit Corp.* case, cited in footnote 5, considers a pro-rata limitation of liability included in the bill of lading, in addition to the statutory limitation,[6] the holding in that case is clear that any attempt to lessen the carrier's liability, other than by the terms of the Act, is invalid. To allow the parties themselves to define what a "package" is would allow a lessening of liability other than by the terms of the Act since a carrier could always limit its liability to $500.00 by merely extract-

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[4]"(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. * * *."

[5]Pan-Am Trade & Credit Corp. v. The Campfire, 156 F. 2d 603 (2 Cir. 1946); cert. denied 329 U. S. 774, sub. nom. Waterman Steamship Corp. v. Pan-American Trade & Credit Corp. (1946). *Contra*: Eyles v. United Fruit Co., 1942 A. M. C. 1470 (SDNY 1942) and The Margaret Lykes, 57 F. Supp. 466 (E. D. La. 1944). But see Middle East Agency v. The John B. Waterman, 86 F. Supp. 487 (SDNY 1949).

[6]The terms of the bill attempted to limit the liability of the carrier further than the limitation provided in the Carriage of Goods by Sea Act in that the conceded package limitation of $500 would be further lessened in the event the goods were not a total loss. Thus, in any single package, if the goods, no matter what their value, were only 50% damaged, only $250 could be recovered. A similar lessening of liability would be applicable in case the limitation of liability was by customary freight unit rather than by package. Even though Paragraph 17 of the Bill of Lading utilized in the instant case contains the same provision as that in the Pan-Am Trade & Credit Corp. case, the pro-rata lessening of liability is not urged by the respondent.

ing a stipulation from the shipper that everything shipped in no matter what form, would be deemed for the purposes of limitation of liability a "package". Since the conceded liability of respondent is predicated upon presumed negligence, the only issue before the Court is the one stated above, that is, whether the tractor in issue, as prepared for shipment, is to be considered a "package", not as defined by the parties but rather within the meaning of the Carriage of Goods by Sea Act.

In determining this vital issue a comparative dearth of authority is encountered. While cases can be found where the goods obviously cannot be considered a "package", such as goods shipped in bulk[7] or goods which have not been prepared for shipment in any way,[8] relatively few cases are reported where the damaged goods for which recovery is sought were to some extent prepared for shipment but were not fully enclosed so as to be considered a "package" in the ordinary layman's sense of the term.

The only reported case which on its facts resembles the instant case is that of *Middle East Agency* v. *The John B. Waterman*, supra, footnote 5. In that case eleven tractors which were not prepared for shipment in any way were held not to be "packages", while parts of a rock crusher, which were prepared for shipment only by being secured to skids, were held to be "packages". Liability for damage to the tractors was, therefore, measured by $500.00 per customary freight unit, while liability for damage to the parts of the rock crusher was measured by $500.00 per package, in that case each individual part of the rock crusher.

In the instant case, the preparation for shipment differed from the preparation utilized on the part of the

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[7] *The Bill*, 56 F. Supp. 780 (Md. 1944).

[8] Petition of Isbrandtsen Company, 201 F. 2d 281 (2 Cir. 1953).

rock crusher in the *Middle East Agency* case, in that here most of the superstructure of the tractor was enclosed, while the treads were completely uncrated and the tractor was not attached to a skid. The distinguishing feature between the *Middle East Agency* case and the instant case is that utilization of the skid facilitated the handling of the item shipped while the packaging of the tractor was only for protective purposes. However, I do not deem it necessary to rest my conclusion merely on this distinguishing factor since the differences in the items themselves and the differences in the methods of their preparation for shipment are great enough of themselves to warrant an independent determination of whether the tractor, as prepared for shipment, is a "package".

While it has been said that the purpose of the package limitation is to protect carriers from exorbitant claims on items whose value is not discoverable because their precise nature is hidden by the package,[8] it does not follow that merely because the value is discoverable the package limitation cannot apply. It can hardly be doubted that such limitation would be considered applicable to bales of cotton and the like and, in fact, in the *Middle East Agency* v. *The John B. Waterman*, supra, footnote 5, the limitation was applied to parts of a rock crusher which were completely exposed. However, in a close case such as the instant one, such a purpose should be taken into consideration.

Here, the item damaged would not be considered a "package" under any ordinary construction of the term. A large tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a "package". The re-

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[8] Whaite v. The Lancashire and Yorkshire Railway Company, L. R. 9 Ex. 467 (1875) construing similar limitation of liability provision in favor of rail carriers. Cf. Stirnimann v. The San Leo, 148 F. 2d 141 (2 Cir. 1945).

spondent herein certainly was well aware of the nature and value of the tractor. Under these circumstances I cannot believe that Congress intended the carrier to be able to limit its liability for its own negligence to a pittance of only $500.00.

At first blush the dictionary definitions of "package" would seem to support respondent's contention. Thus, for example, *Black's Law Dictionary* defines "package" as follows:

> "PACKAGE. A bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand. A parcel is a small package; 'parcel' being the diminutive of 'Package'. Each of the words denotes a thing in form suitable for transportation or handling or sale from hand to hand. As ordinarily understood in the commercial world, it means a shipping package."

However, I do not believe that the mere fact that an item is in some way prepared for shipment will thereby effect the result of making that item, as so prepared, a package within the meaning of the Carriage of Goods by Sea Act. To adopt such a construction it would have to be said that a shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive parts would be in a worse position than a shipper who cavalierly makes no effort to reduce the possibility of loss not only to himself but to the carrier. Such result would hardly foster good commercial practices.

While I am aware of the fact that there is a strong public policy to encourage American Merchant Marine activities by subsidies and by various forms of limitation

of liability[10] a limitation of the kind urged by respondent appears too great a hardship on shippers and thus not intended by Congress. The liability of the carrier is, of course, limited to $500.00 per customary freight unit, that is the basis upon which the freight was charged.[11] Thus, the liability of the respondent is limited to $17,300.00 (34.6 M/T × $500.00).

An interlocutory decree should be entered referring the issue of computation of damages to a Master.

Settle Decree.

Dated: New York, N. Y.
January 13th, 1958.

JOHN M. CASHIN
*United States District Judge*

[10] See concurring Opinion of Judge Clark in Petition of Isbrandtsen Company, supra, at page 287.

[11] Petition of Isbrandtsen Company, supra.

## SUPPLEMENT B

### Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 29—October Term, 1958.

(Argued October 21, 1958 Decided January 28, 1959.)

Docket No. 25066

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GULF ITALIA COMPANY,

*Libellant-Appellee,*

—v.—

AMERICAN EXPORT LINES, INC.,

*Respondent-Appellant.*

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Before:

SWAN and MOORE, *Circuit Judges*, and
KAUFMAN, *District Judge*.

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Appeal from an interlocutory decree of the United States District Court for the Southern District of New York, Cashin, *J.* in a libel for damage to cargo. Affirmed.

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HAIGHT, GARDNER, POOR & HAVENS, *Proctors for Appellant*. Kenneth Gardner and M. E. De Orchis of Counsel.

BURLINGHAM, HOPPER & KENNEDY, Proctors for *Appellee*. Eugene Underwood and Herbert M. Lord of Counsel.

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*Opinion of the Court of Appeals*

SWAN, *Circuit Judge*:

The libellant filed a libel in admiralty against American Export Lines, Inc., to recover for damage to a caterpillar tractor which was carried on respondent's steamship Exiria from New York to Palermo in August 1954. The tractor was damaged while being unloaded. Respondent conceded responsibility but maintained that its liability is limited by the $500. limit-of-value provision in § 1304(5), and a similar provision in the bill of lading.[1] The tractor was prepared for shipment by putting waterproof papering over some of its parts and by partially encasing the superstructure with wooden planking. The tread portions of the tractor were uncovered and the tractor was not attached to a skid. The tractor was described in the bill of lading as "semi-boxed." Judge Cashin held that the tractor was not a "package" and that the limitation on liability must be computed on the basis of "customary freight unit." There were 34.6 such units; consequently respondent's liability was limited to $17,300., and the issue as to computation of damages was referred to a master. Judge Cashin's opinion is reported 160 F. Supp. 956. Respondent has appealed.

Section 4(5) of the Act divides "the transportation of goods" into two categories: "packages" and "goods not shipped in packages." Plainly the tractor was not shipped *in* a package, unless the covering of certain portions of it make it a "package" within the meaning of the Act. Ap-

[1] 46 U. S. C. A. § 1304(5) provides: "5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper, before shipment and inserted in the bill of lading."

parently the appellant contends that any preparation of goods for ocean transportation converts the goods into a "package." Such a construction of the section would cause "a shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive parts," to be placed in a worse position that a shipper who makes no effort to reduce the possibility of loss from inclement weather or pilfering. We agree with Judge Cashin that "such result would hardly foster good commercial practices."[2] Any test dependent upon extent of external covering would lead to uncertainty and increase litigation. We cannot believe that Congress intended "package" to be defined in a way to produce such a result. The District Court was correct in holding that the tractor was not a "package."

With respect to the words "customary freight unit" appellant argues that "unit" refers to shipping unit not freighting unit. Such construction is foreclosed by *Petition of Isbrandtsen Company, Inc.*, 2 Cir. 201 F. 2d 281, 286:

> "The authorities have construed the words 'customary freight unit' to refer to the unit upon which the charge for freight is computed and not in the shipping unit."

See also *Stirnimann* v. *The San Diego*, 2 Cir. 148 F. 2d 141, 143; *Waterman S.S. Corp.* v. *U. S. Smelting, Refining & Mining Co.*, 5 Cir. 155 F. 2d 687, cert. den. 329 U. S. 761; *The Bill*, D. C. Md. 55 F. Supp. 780, 783. Cf. *Studebaker Distributors, Ltd.* v. *Charlton S.S. Co. Ltd.*, [1938], 1 K. B. 459.

Decree affirmed.

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[2] 160 F. Supp. 956, at 960.

MOORE, *Circuit Judge* (dissenting):

I cannot agree that the tractor in question does not come within the definitions of "package" or "customary freight unit" as applied in the shipping world. The tractor as described in the majority opinion and as clearly shown in the photographs (Exhibits 4, 5, 6, 7 and A) was about as carefully packaged as a tractor with protruding treads could be. The bill of lading listed the tractor under the headings "No. OF PKGS. DESCRIPTION OF PACKAGES AND GOODS." Although such titles are not controlling, they are not to be completely disregarded. Under these titles the tractor was listed as "1 Semi-Boxed" and at the bottom appears the total of "6 PACKAGES" (Exh. B). At the bottom of the bill the items of freight to be paid were computed, some on a 100-pound basis, some on a 2240-pound basis and some on a 40 cubic feet basis. Despite the fact that both shippers and carriers have had many years in which to clarify the meaning of "package" and "customary freight unit" apparently little has been done in this field. There is a surprising dearth of decided cases on the subject. The few cases cited by appellant and appellees are either dissimilar as to the facts or are conflicting.

The trial court was obviously influenced (and understandably so) by the fact that a "package" to the average person would not include a large tractor, saying "A large tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a 'package.'" However, a layman's definition of a package should not be determinative here. The fact that the shipping industry does not so regard a package is well illustrated by appellee's concession on argument that a large automobile completely enclosed in a packing case would be a "package." A casual inspection of the average pier shows hundreds of "packages" of great size

and weight which would be in the same category. Obviously weight, size or value should not control. Had a few additional pieces of lumber been placed around the tractor treads a package would concededly have resulted, but this would have been a needless act because the treads themselves did not require protection. It would indeed be an anomalous situation if a shipper who had completely enclosed a tractor were limited to damages of $500 whereas another shipper could recover on a weight or size basis merely because he had allowed some indestructible part to protrude from the package.

As to the law this court in *Petition of Isbrandtsen Company*, 2 Cir., 1953, 201 F. 2d 281, said that under the Act liability was limited to $500 per customary freight unit, which unit was held to be that unit of measure by which the freight charges were calculated. However, that case involved a "customary freight unit" consisting of a locomotive and tender. It happened there that the shipping unit and the unit for computing the freight charge were the same, namely, the locomotive and tender. The carrier's liability was limited to $500 per locomotive and tender. The doctrine of freight unit being the same as the unit by which freight charges are computed apparently originated in *The Bill*, D. C., Md., 1944, 55 F. Supp. 780, aff'd *per curiam* 4 Cir., 1944, 145 F. 2d 470. In that case the cargo was oil shipped in bulk. Some unit of liability had to be found so the court concluded that "customary freight unit" should be that unit "customarily used as the basis for the calculation of the freight rate to be charged." Thereafter, however, in *Stirnimann* v. *The San Diego*, 2 Cir., 1945, 148 F. 2d 141, affirming S. D. N. Y. 1944, 55 F. Supp. 798, this court affirmed the trial court's holding that each of the 126 pieces in which a giant amusement crane had been shipped was a separate package or freight unit for which liability was limited

to $500 each. This court rejected the carrier's argument that since freight for the entire crane was charged in one lump sum it was only one customary freight unit under the rule of *The Bill, supra.* It was noted in this court's opinion that each piece of the crane had been carefully weighed and measured, and was described in a schedule attached to the bill of lading. This decision would seem to support appellant in the present case, where the single tractor may be a customary freight unit, as were each of the 126 pieces of the giant crane in *Stirnimann.*

*Waterman S.S. Corp.* v. *United States S. R. & M. Co.*, 5 Cir., 1946, 155 F. 2d 687 was cited in *Petition of Isbrandtsen Company, supra,* to support this court's definition of "customary freight unit." Like *The Bill,* however, it is distinguishable from the present case in that the cargo, 698 pieces of structural steel, was shipped in bulk. Thirteen pieces were lost overboard and the court did not regard each as a customary freight unit. Since the freight was charged at 64¢ per 100 pounds that unit of measure was held to be the customary freight unit.

*Middle East Agency* v. *The John B. Waterman,* S. D. N. Y., 1949, 86 F. Supp. 487, is the case most directly supporting appellee. The cargo consisted of eleven uncrated tractors and a rock crusher which was shipped "knocked down" in 21 items. Five of the items were pieces of machinery not packaged but merely on skids. The court held them to be packages for purposes of limitation. As to an uncrated and uncased piece of machinery not on skids and the eleven uncrated tractors the court allowed a limitation of $500 per measurement ton (40 cubic feet), rejecting the respondent's argument that each tractor and piece of machinery was a customary freight unit. To hold a piece of machinery a package simply because it has skids attached and to limit liability for damage to $500, where the same

machinery without skids, if large or heavy, would subject the carrier to a much greater liability for loss, seems unreasonably to extend the meaning of "package" and to bring about a result that is highly inequitable. Nor is there any reason for not regarding a tractor as a "customary freight unit."

The trial court could not "believe that Congress intended the carrier to be able to limit its liability for its own negligence to a pittance of only $500.00." However, had appellee wished to obtain protection on an *ad valorem* basis it could have done so. Under the Act this choice is open to shippers although the *ad valorem* rates are higher.

## SUPPLEMENT C

**Agreed Statement of Facts**

(Record, pages 81-104)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

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Libelant, Gulf Italia Company, a Delaware corporate subsidiary of Gulf Oil Corporation, brought suit to recover for damage to a tractor which was shipped on respondent's vessel, S.S. EXIRIA, from New York to Palermo under a bill of lading dated August 18, 1954. *Exhibit 1.*

Libelant was the owner of the tractor purchased for it by Gulf Oil Corporation from Beckwith Machinery Company at Pittsburgh, Pa., on July 21, 1954. Beckwith shipped the tractor by rail to New York. Copies of the rail carrier's bill of lading and arrival notice, both describing the tractor, when prepared for export, as "1 D-8 tractor", under a column headed "No. of pkgs.", are attached as *Exhibits 2 and 3.*

The dock receipt and ocean bill of lading which were prepared by the forwarding agent of Gulf Oil Corporation and submitted to respondent covered one truck, not in suit, and one caterpillar tractor. When presented to the respondent the bill of lading and dock receipt, under column headings "No. of pkgs. Description of Packages and Goods" described the tractor as "3 pieces, 2 boxes." *Exhibit 3A, 3B.* The respondent changed the description to "1 semi-boxed, 2 pieces, 2 boxes." The writing was that

of the respondent's agent but respondent does not concede that it initiated the change.

The tractor itself, which is the only item in suit, was the item described as "semi-boxed". Two "pieces" and two "boxes" comprised equipment and accessories which were not damaged. The tractor was not shipped on skids. Photographs showing the manner in which the tractor was prepared for export are attached as *Exhibits 4, 5, 6 and 7.*

Gulf Oil Corporation's printed form of shipping instructions requested that such shipments be "packed securely for export, Each Box, Crate, Bundle, Piece to be marked: AIF & PCO Palermo, Sicily 739", *Exhibit 8,* was sent to Beckwith Machinery Company attached to Gulf Oil Corporation's purchase order dated June 18, 1954. *Exhibit 9.*

The name of American International Fuel & Petroleum Co., for whose account the purchase was made, was changed to Gulf Italia Company between the time of said purchase and the bringing of this suit.

Respondent has stipulated responsibility for the loss and on February 8, 1956, formally offered to submit to a decree for five hundred dollars, with costs to the date of the offer of February 8, 1956 and with interest to such date from September 6, 1956. *Exhibit 10.*

The bill of lading contains the following clause:

> "17. In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher

than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in the bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value."

Gulf Oil Corporation and respondent are both members of the North Atlantic Mediterranean Freight Conference and as members they both agreed to the Tariff. Libelant concedes that the Tariff applies to it to the same extent as it applies to Gulf Oil Corporation. *Exhibits 11, 12, 13, 14 and 15* are photostatic copies of the pages of the Conference Tariff containing the provisions upon which the freight charges were based. *Exhibit 11* is the cover page. *Exhibit 12* shows the rate applicable to "packed" and "unpacked" roadbuilding machinery. The "packed" roadbuilding machinery rate, which was the rate expressly provided in the Tariff for "packed" tractors, was $27.50 per weight or measurement ton and the "unpacked" rate was $32.50 per W/M ton, unless a shipper should declare an excess valuation. *Exhibit 13 provides that "Tractors,* boxed with the exception of traction treads—Apply Roadbuilding, etc., Boxed Rate Or Agricultural Boxed Rate as the case may be.". *Exhibit 14* shows Heavy Lift Scale, indicating that items weighing 15 to 20 tons carry an additional heavy lift rate of $11.00 per weight or measurement ton. *Exhibit 15* shows provisions covering choice of rates.

Libelant did not declare the value of the tractor before shipment and did not pay additional *ad valorem* rates.

Libelant does not concede that the tractor was "boxed with the exception of traction treads." The Tariff does not contain any specific language to the effect that a shipper paying the "packed" rate for semi-boxed tractor agrees to accept the bill of lading limitation applied to goods shipped in packages.

The rate applied to the tractor, which measured 1,384 cubic feet or 34.6 measurement tons (40 cubic feet), amounted to $1,332.10 computed as follows: 34.6 measurement tons at $27.50 plus $11.00 per ton. The $27.50 was the Tariff rate for "packed" tractors and the $11.00 was the Tariff rate for the heavy lift.

Originally the carrier had misapplied the heavy lift rate, which was correctly shown on the bill of lading, charging only $9.90, but this was corrected as a result of a letter from the shipper dated August 31, 1954. *Exhibit 16.* The correction was made, September 1, 1954. *Exhibit 17.*

Gulf Oil Corporation, as agent for libelant, submitted to respondent a "Damage Claim Statement" with supporting documents attached, dated June 8, 1955. *Exhibit 18.* The total claim is $18,275.64. The amount of damage sustained by the tractor is in dispute.

If the tractor had been shipped at the "unpacked" rate of $32.50 instead of the "packed" rate of $27.50, libelant would have had to pay an additional freight charge of $163. *Exhibit 12.*

If the shipper had declared the value before shipment, he would in addition, have had to pay an *ad valorem* rate of 6% on the value declared in excess of the bill of lading limit of value. *Exhibit 15.*

If the carrier's limitation is computed on the "package" basis, its liability amounts to $500 with interest and costs under the Offer of a Decree. *Exhibit 10.* If the limitation

is computed on the basis of measurement tons as the customary freight unit, libelant's recovery would be limited to $17,300 (34.6 M/T × $500), with interest and costs.

On August 18, 1954, the tractor was loaded on board respondent's S.S. EXIRIA under deck and transported to Palermo, Sicily. In the course of discharging the tractor at Palermo, September 6, 1954 from No. 3 Hatch, the slings broke and the tractor was dropped from a point about three feet above the level of the hatch on the main deck into the hold, sustaining the damage in suit.

Libelant and Respondent reserve their right to object to any of the aforesaid facts on the grounds of irrelevancy or immaterialjty.

BURLINGHAM, HUPPER & KENNEDY
Proctors for Libelant

HAIGHT, GARDNER, POOR & HAVENS
Proctors for Respondent

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FILED
MAY 28 1959
JAMES R. BROWNING, Clerk

# Supreme Court of the United States

**October Term, 1958**

**No. 871.**

AMERICAN EXPORT LINES, INC.,
*Petitioner,*

*against*

GULF ITALIA COMPANY,
*Respondent.*

## BRIEF FOR RESPONDENT, GULF ITALIA COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Gulf Italia Company.*

HERBERT M. LORD
and
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# INDEX


| | PAGE |
|---|---|
| ARGUMENT | 1 |
| The Case is Essentially One of Fact and is Not a Case for Review by this Court | 1 |
| The Reasons Asserted by Petitioner for Granting the Writ Are Not Valid | 3 |
| As to the claimed important question of construction and application of Section 4(5) of the United States Carriage of Goods by Sea Act | 3 |
| As to the contention that the meaning given by the Courts below to the words "package" and "customary freight unit" has kept the intent and meaning of the limitation clause in a state of uncertainty and confusion | 4 |
| As to the alleged erroneous application of the "bulk cargo rule of The Bill" | 6 |
| As concerns petitioner's contention that respondent should have been estopped from asserting a higher value after it had accepted the benefit of "the lower rate which was dependent upon the specified $500 limitation" | 8 |
| CONCLUSION | 10 |


## Table of Cases Cited


| | |
|---|---|
| Adams Express Co. v. Croninger, 226 U. S. 491 (1913) | 9 |
| Aktieselskabet Bruusgaard v. Standard Oil Co. of New Jersey, 283 Fed. 106 (C. C. A. 2, 1922) | 7 |
| Bill, The, 55 F. Supp. 780 (D. C. Md., 1944), aff'd per curiam 145 F. 2d 470 (4th Cir., 1944) | 6, 7 |
| Hart v. Pennsylvania Railroad Co., 112 U. S. 331 (1884) | 9 |

PAGE

Kensington, The, 183 U. S. 263 (1902) ..... 9
Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639 (1913) ..... 10
Middle East Agency v. The John B. Waterman, 86 F. Supp. 487 (S. D. N. Y., 1949) ..... 5, 6
Peter Pannell v. United States Lines, 263 F. 2d 497 (2d Cir., 1959) ..... 5
Petition of Isbrandtsen Co., Inc., 201 F. 2d 281 (2d Cir., 1953) ..... 4, 6, 7
Stirnimann v. The San Diego, 148 F. 2d 141 (2d Cir., 1945) ..... 4, 5, 7
Texas Petroleum Company v. The Margaret Lykes, 57 F. Supp. 466 (1944) ..... 6
Union Pacific R. R. Co. v. Burke, 255 U. S. 317 (1921) 10
U. S. Willow Furniture Co. v. La Compagnie Générale Transatlantique, 271 Fed. 184 (C. C. A. 2, 1921) ..... 9
Waterman Steamship Corp. v. United States Smelting, Refining & Mining Co., 155 F. 2d 687 (5th Cir., 1946), cert. den. 329 U. S. 761 ..... 5, 6

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# Supreme Court of the United States

**October Term, 1958**

**No. 871**

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AMERICAN EXPORT LINES, INC.,

*Petitioner,*

*against*

GULF ITALIA COMPANY,

*Respondent.*

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## BRIEF FOR RESPONDENT, GULF ITALIA COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The questions of law urged as reasons for granting of the writ as set out in the petition simply do not exist. We urge denial of the writ because only a question of fact is involved which was found in favor of respondent by both courts below.

## ARGUMENT

### This Case is Essentially One of Fact and is Not a Case for Review by this Court

Petitioner damaged respondent's tractor during discharge from the SS EXIRIA at Palermo, Italy on September 6, 1954. The tractor had been shipped to seaboard from Pittsburgh by Gulf Oil Corporation, as respondent's agent. Gulf had purchased it from Beckwith Machinery Company, and thereafter sent Beckwith its printed form of shipping instructions requesting that the shipment be "packed se-

curely for export, each Box, Crate, Bundle, Piece to be marked: AIF & PCO, Palermo, Sicily, 739" (Petitioner's Appendix, p. 13a). The railroad accepted and transported the tractor to New York as "1 D-8 tractor", and so described it on its bill of lading and arrival notice (Appendix, p. 12a). Gulf's forwarding agent at New York prepared the ocean bill of lading describing the tractor as a "piece", but *petitioner's* receiving clerk changed it to "semi-boxed" (Appendix, p. 12a and 13a).

Respondent paid the only tariff rate provided for a "semi-boxed tractor", and the tariff did not provide any rate for a semi-boxed tractor shipped "unpacked". Petitioner's bill of lading did not define either "pieces" or "semi-boxed" articles as packages. It did state that the value of the goods should be deemed to be, for purposes of claim, "$500 per package or per unit on which basis the freight is adjusted" (Appendix, p. 41a). Respondent was charged and paid freight based upon the freight unit of measurement tons.

The District Court (Cashin, J.) held that the case turned on "one basic issue" of fact, viz., whether the tractor was a "package" under the Carriage of Goods by Sea Act (Appendix, p. 3a). The Court found that:

> "The tractor was prepared for shipment by putting waterproof papering about some of the more vital parts of the superstructure and by partially encasing the superstructure with wooden planking. The tread portion of the tractor was not prepared for shipment in any way, nor was the tractor attached to a skid." (Appendix, pp. 2a-3a)

The District Court therefore applied the $500 freight unit limit to the 34.6 units of measurement tons upon which the freight charges were based, thus limiting petitioner's liability for respondent's $18,275.64 loss to $17,300.

The Court of Appeals agreed with the District Court's finding that the tractor was not a package and sustained

application of the limitation to the tariff freight unit of measurement tons.

Both courts decided the case as one of fact and we submit that no question of law of general application has been or can be presented on the record to which the petitioner asks this Court to direct its writ.

## The Reasons Asserted by Petitioner for Granting the Writ Are Not Valid

### As to the claimed important question of construction and application of Section 4(5) of the United States Carriage of Goods by Sea Act.

The narrow question of fact whether a "semi-boxed" tractor is a package is not of sufficient importance to provide a reason for granting the writ.

If, as petitioner now contends (p. 6), the question really is "Who is to buy the insurance above the $500 limitation," the petition must, we submit, be denied because the record contains nothing on the subject of insurance, and respondent was in fact uninsured.

Respondent was not called upon to declare a valuation in excess of $500, because the tractor was not a package.

Respondent did not know that petitioner was claiming that the tractor was a package.

Neither the tariff nor the bill of lading stated that "semi-boxed" goods were subject to a $500 "package" limitation, and respondent was charged and paid the only tariff rate for a "semi-boxed tractor".

We know of no confusion generated by the concurrent findings of the courts below that respondent's tractor was not a package. Had petitioner desired to apply a $500 limitation to the tractor, it could have provided in its tariff

a flat charge per tractor. *Petition of Isbrandtsen Co., Inc.*, 201 F. 2d 281, 286 (2d Cir., 1953). But petitioner could not change the character of respondent's cargo as a tractor by attaching the confusing label "semi-boxed", and by such device limit its liability to $500.

**As to the contention that the meaning given by the courts below the words "package" and "customary freight unit" has left the intent and meaning of the limitation clause in a state of uncertainty and confusion.**

Respondent has never contended, and the courts below did not hold, that an item of cargo cannot be regarded as a package unless fully enclosed. Both courts did reject the argument made by petitioner that any preparation of the goods for ocean transportation required a finding that the item in question was a "package".

The District Court stated that this tractor would not be regarded as a package under any ordinary construction of the term, because

> "A large tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a 'package'." (Appendix, 6a)

The District Court took into consideration the purpose of the package limitation—to protect common carriers from unexpectedly sizeable risks in transporting parcels containing articles of great value, 4 Halsbury, The Laws of England, p. 21; *White* v. *The Lancashire & Yorkshire Railway Company* (1874) L. R. 9 Exch. 67, 70; *Stirnimann* v. *The San Diego*, 148 F. 2d 141 (2d Cir., 1945), and found nothing in the historical purpose requiring it to adopt a meaning of the word "package" other than that commonly understood.

This case is not contrary to other decisions in the Second Circuit or the controlling decisions in any other Circuit. It has never been held that a "semi-boxed" tractor is a package. We know of no decision or statement of any court supporting the position of petitioner that goods must

be considered not shipped in packages only when completely uncovered. A number of cases have held goods not to be packages even where the shippers made substantial efforts to prepare them for ocean shipment.

In *Stirnimann* v. *The San Diego, supra*, 148 F. 2d 141 (2d Cir., 1945), a giant amusement crane was prepared for shipment by disassembling it into 126 parts. The Court of Appeals said, at page 143, that

> "• • • the crane was hardly to be regarded as shipped in packages"

although it is clear from the District Court's opinion (55 F. Supp. 798) that some parts of the crane were crated.

In *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 487 (S. D. N. Y., 1949), 5 of 21 component parts of a rock crusher "knocked down" for shipment were held to be packages, not because of their preparation for shipment, but because they were shipped on skids, to which the machinery parts had been securely bolted.

In *Peter Pannell* v. *United States Lines*, 263 F. 2d 497 (2d Cir., 1959), the Court of Appeals held that a yacht shipped on deck should in that case be regarded as a package because the Carriage of Goods by Sea Act by its terms does not apply to on-deck shipments and because that carrier's bill of lading, *unlike petitioner's*, specified that every piece or article shipped should be regarded as a package.

The courts having held that certain cargoes prepared for shipment were not considered shipped in packages, other items of machinery or pieces of cargo in no way prepared for shipment even more clearly were considered not shipped in packages. *Studebaker Distributors, Ltd.* v. *Charlton S.S. Co., Ltd.* [1938] 1 K. B. 459 (unboxed automobiles); *Waterman Steamship Corp.* v. *United States Smelting, Refining & Mining Co.*, 155 F. 2d 687 (5th Cir., 1946), cert. den. 329 U. S. 761 (pieces of steel), and unboxed

tractors in *Middle East Agency* v. *The John B. Waterman*, *supra*, 86 F. Supp. 487. The courts were asked to decide only the cases before them on the issues of fact there presented, and they in no way support petitioner's contention that any covering on cargo requires a holding that such cargo is a "package" within the Act.

No plain meaning of the statute has been violated. Whatever confusion may be claimed to exist must relate to the carrier's anomalous description of respondent's tractor as "semi-boxed".

**As to the alleged erroneous application of the "bulk cargo rule of The Bill".**

In the District Court, petitioner did not make the argument that the "customary freight unit" meant the "shipping" unit, but was content there to have the case decided on what the court found was the sole issue, one of fact, whether the tractor was a "package".

It has generally been considered that the "customary freight unit" in the Act means the unit of cargo upon which the charge for freight is computed and not the cargo itself. *The Bill*, 55 F. Supp. 780, 783 (D. C. Md., 1944), aff'd per curiam 145 F. 2d 470 (4th Cir., 1944); *Waterman Steamship Corp.* v. *United States Smelting, Refining & Mining Co.*, *supra*, 155 F. 2d 687, 693 (5th Cir., 19[illegible], cert. den. 329 U. S. 761; *Petition of Isbrandtsen Co., Inc.*, *supra*, 201 F. 2d 281, 286 (2d Cir., 1953).

The sole contrary decision is that of the District Court for the Eastern District of Louisiana in *Texas Petroleum Company* v. *The Margaret Lykes*, 57 F. Supp. 466 (1944). The District Court for the Southern District of New York specifically rejected *The Margaret Lykes* on the point in *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 486, 487, 491 (1949), and *The Margaret Lykes* is contrary to the decision of the 5th Circuit in *Waterman Steamship Corp.* v. *United States Smelting, Refining & Mining Co.*,

155 F. 2d 687 (1946), cert. den. 329 U. S. 761, to the decision of the Second Circuit in *Stirnimann* v. *The San Diego*, 148 F. 2d 141 (1945), and to the statement of the Second Circuit as to the authorities' construction of the term "freight unit" in *Petition of Isbrandtsen Company, Inc.*, 201 F. 2d 281, 286 (1953).

We have never before heard of the "bulk cargo rule of *The Bill*".

Petitioner's own bill of lading specifies that the customary freight unit is the "unit on which basis the freight is adjusted". (Appendix, 41a, Clause 17) There could not be a more unsuitable case in which to ask this Court to grant its writ for the purpose of determining that the "freight unit" means the goods themselves.

Nothing is added by the statement of Judge Hough that "unit" in the original text of the Hague Rules meant the same as "customary freight unit". This experienced admiralty lawyer and jurist could not have been unaware that "freight" in maritime commerce means compensation for carriage of goods, not the goods themselves. Benedict, *On Admiralty*, 6th Ed., Vol. 1, Sec. 92, page 284; Carver, *On Carriage of Goods by Sea*, 9th Ed., p. 809. Judge Hough showed his appreciation of the distinction between "freight" and "goods" in his opinion in *Aktieselskabet Brausgaard* v. *Standard Oil Co. of New Jersey*, 283 Fed. 106 (C. C. A. 2, 1922), when he described the compensation for ocean carriage of goods as "freight money" (107). When referring in 1927 to the text of the 1922 Brussels Convention, he plainly meant that "freight unit" was the unit of measurement of the cargo to which the freight applied.

The history of Section 4(5) of the Act supports the conclusion below that "customary freight unit" means the measurement unit of the cargo upon which the freight is based, and not the cargo itself. As Chestnut, J., said in *The Bill*, *supra*, 55 F. Supp. 780 (D. C. Md., 1944), aff'd per curiam, 145 F. 2d 470 (4th Cir., 1944):

> "Upon consideration of this hitherto unadjudicated point, I conclude that the phrase 'per customary freight unit' in this context in the light of its legislative history, refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. Generally, in marine contracts the word 'freight' is used to denote remuneration or reward for carriage of goods by ship, rather than the goods themselves. Benedict on Admiralty, Vol. I, 6th Ed., § 92, p. 284; Carver on Carriage of Goods by Sea, 8th Ed., § 543, p. 755; Richards on Insurance, 4th Ed., § 424, p. 765" (783).

The argument that respondent's tractor was itself the "customary *shipping* unit" to which the $500 limitation should apply is unsupported by any evidence in the record, is contrary to the authorities, is inconsistent with the terms of petitioner's bill of lading and the established meaning of "freight" in marine commerce. Moreover, the record does not contain the essential facts upon which a redetermination of the now clearly established meaning of "customary freight unit" can be made.

**As concerns petitioner's contention that respondent should have been estopped from asserting a higher value after it had accepted the benefit of "the lower rate which was dependent upon the specified $500 limitation".**

The point heading on page 15 of the Petition implies that the estoppel argument is based upon decisions of this Court. Certainly no estoppel argument can be supported by the facts in this case. The tariff provided no "lower rate" for tractors shipped "unpacked". Petitioner's own receiving clerk changed Gulf's description of the cargo from "piece" to "semi-boxed", and respondent was charged and paid the only tariff rate provided for a "semi-boxed" tractor. The bill of lading applied the $500 limitation uniformly to packages or customary freight units. Petitioner's liability, under its bill of lading, would have

been limited to $500 only if the tractor was a package. Petitioner is guilty of "boot-straps" reasoning, because the estoppel argument can be made only if the tractor was a package. The courts below have found that it was not.

We have no quarrel with the cases cited by petitioner under this heading, but they have no application to this case.

In *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331 (1884), a shipper and rail carrier agreed upon a valuation for a shipment of horses. There was no agreed valuation in the present case apart from that provided in Clause 17 of petitioner's bill of lading, that "• • • the value of the goods shall be deemed to be $500 per package or per unit on which basis the freight is adjusted • • •." Respondent is not contending that there is anything improper about a reasonable and fully understood agreement as to valuation of goods.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913), this Court sustained what it termed a fair, reasonable and just agreement as to the valuation of goods. That shipment was received and transported under an agreement specifying that the value of the property shipped

> "• • • is not more than fifty dollars, unless a greater value is stated herein • • •" (508).

In *The Kensington*, 183 U. S. 263 (1902), a baggage valuation provision in a passage contract was held void because unaccompanied by a right to increase the amount by proportional payment. In that case there was no doubt that the limitation applies to the baggage, and that the passenger and the carrier so agreed.

In *U. S. Willow Furniture Co.* v. *La Compagnie Générale Transatlantique*, 271 Fed. 184 (C. C. A. 2, 1921), the Court of Appeals apparently accepted without deciding that the carrier could limit its liability to the invoice value of the goods at port of shipment plus ocean freight. That question is not presented here.

In *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317 (1921), the shipper and carrier had agreed to a $100 per package valuation in respect of goods shipped by rail. There was no question but that the consignment, consisting of 56 cases, was made up of packages. The Court sustained the bill of lading valuation of the goods. We are not contending here, had the tractor been a package, that the $500 limitation would not have applied.

In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639 (1913), a shipper declared to a railroad a low valuation of his shipment to obtain a low freight rate. This Court held that the shipper was bound by the valuation declared, and we agree that he should have been. In this case, however, respondent declared no valuation, but was content with the application of the $500 limit to the freight units of measurement tons.

None of petitioner's authorities can provide a factual basis for an estoppel argument entirely lacking in the record.

## CONCLUSION

**For the reasons above set forth, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.**

Dated: New York, New York
May 25, 1959

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